

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**October 8, 2013**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2013AP151-CR**

**Cir. Ct. No. 2008CF1110**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**GREGORY OWENS,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEAN A. DiMOTTO, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Gregory Owens appeals a judgment entered upon his guilty plea to one count of possessing with intent to deliver more than forty grams of cocaine. He also appeals a postconviction order denying his motion to modify his sentence. The only issue on appeal is whether the circuit court erred by

refusing to declare Owens eligible to participate in the Wisconsin Substance Abuse Program. We affirm.

¶2 The circuit court sentenced Owens in 2009 for possessing with intent to deliver more than forty grams of cocaine. He faced a maximum sentence of forty years of imprisonment and a \$100,000 fine. *See* WIS. STAT. §§ 961.41(1m)(cm)4. (2009-10); 939.50(3)(c) (2009-10).<sup>1</sup> At sentencing, the circuit court rejected both his recommendation for eighteen-to-twenty-four months of initial confinement and the State’s recommendation for four years each of initial confinement and extended supervision. The circuit court instead imposed six years of initial confinement and eighteen months of extended supervision.

¶3 The circuit court acknowledged at sentencing that Owens had physical and mental health problems, some of which stemmed from his military service in Vietnam, and the circuit court recognized that he was addicted to cocaine. The circuit court emphasized, however, that Owens was arrested with 102 grams of cocaine and that he had a loaded handgun in his home. The circuit court rejected the suggestion that drug addiction excused Owens’s conduct, assuring him that if the circuit court “thought that this crime was about [his] addiction, it would be a different sentence.” The circuit court found that Owens was engaged in “large scale cocaine trafficking,” and that “an addiction does not explain [drug] dealing at this level.” While the circuit court did not doubt Owens’s remorsefulness, the circuit court observed that he had “two convictions in Chicago at the minimum, [and] multiple, multiple arrests,” and the circuit court

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<sup>1</sup> All subsequent references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

also noted with concern that he had involved other people who assisted him in bringing “poison” into the community. The circuit court concluded that Owens must be punished for his conduct, and that he and any others who might act similarly must be deterred from cocaine trafficking in the future. The circuit court further determined that, “based on [Owens’s] physical and mental conditions,” he was ineligible to participate in the Wisconsin Substance Abuse Program.<sup>2</sup>

¶4 Owens moved for postconviction relief. As relevant here, he argued that his physical and mental health conditions did not necessarily preclude him from participating in the Substance Abuse Program, and he asked the circuit court to modify his sentence to make him eligible to participate.<sup>3</sup> The circuit court denied the request on the ground that Owens’s ineligibility for the program furthered the sentencing goals. Owens appeals.

¶5 The Substance Abuse Program is a prison treatment program. *See* WIS. STAT. § 302.05. “An inmate serving the confinement portion of a bifurcated sentence who successfully completes the [program] will have his or her remaining confinement period converted to extended supervision, although the total length of the sentence will not change.” *State v. Owens*, 2006 WI App 75, ¶5, 291 Wis. 2d 229, 713 N.W.2d 187; *see also* WIS. STAT. § 302.05(3)(c)2. Offenders convicted of a crime specified in WIS. STAT. ch. 940, and offenders convicted of certain crimes against children specified in WIS. STAT. ch. 948, are statutorily precluded

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<sup>2</sup> At the time of Owens’s sentencing, the Wisconsin Substance Abuse Program was called the Wisconsin Earned Release Program. Effective August 3, 2011, the legislature renamed the program. *See* 2011 Wis. Act 38, § 19; WIS. STAT. § 991.11. The program is identified by both its former name and its new name in the current version of the Wisconsin Statutes. *See* WIS. STAT. §§ 302.05; 973.01(3g). For the sake of clarity, we refer to the program by its new name.

<sup>3</sup> Owens also successfully moved the circuit court for relief from a DNA surcharge.

from participating in the Substance Abuse Program. *See* § 302.05(3)(a)1. As to any other offender, the circuit court must decide as part of its exercise of sentencing discretion whether he or she is eligible to participate. *See* WIS. STAT. § 973.01(3g). When exercising discretion on this issue, however, the circuit court is not required to make “completely separate findings ... so long as the overall sentencing rationale also justifies the [eligibility] determination.” *Owens*, 291 Wis. 2d 229, ¶9.

¶6 The duties of a circuit court when exercising sentencing discretion are well-known. The circuit court must determine the most important objectives of the sentence. *State v. Gallion*, 2004 WI 42, ¶41, 270 Wis. 2d 535, 678 N.W.2d 197. In seeking to fulfill the chosen objectives, the circuit court must consider the primary sentencing factors, namely, the seriousness of the offense, the defendant’s character, and the need to protect the public, and the circuit court may also take into account a wide variety of additional factors. *See State v. Harris*, 2010 WI 79, ¶¶28-29, 326 Wis. 2d 685, 786 N.W.2d 409. The weight that a circuit court assigns to the sentencing factors lies within the circuit court’s wide discretion. *See id.*, ¶28.

¶7 When we review a sentencing decision, we presume that the decision is reasonable, because the circuit court is in the best position to consider the relevant factors and the defendant’s demeanor. *See Gallion*, 270 Wis. 2d 535, ¶18. Moreover, “[e]ven in instances where a sentencing judge fails to properly exercise discretion, this court will ‘search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained.’” *State v. Odom*, 2006 WI App 145, ¶8, 294 Wis. 2d 844, 720 N.W.2d 695 (citation omitted).

¶8 Here, Owens contended in postconviction proceedings that poor health is not a statutory barrier to participation in the Substance Abuse Program and that the circuit court therefore erroneously denied him eligibility for the program on the basis of his medical conditions. The circuit court refused to modify his eligibility status, explaining that, although his health conditions do not automatically exclude him from participation, nonetheless, in this case:

the primary purpose of the sentence was to punish [Owens] for his high level drug dealing and to deter him and others from engaging in conduct of this nature. The court intended for the defendant to serve the full duration of the initial confinement term as the punishment for this offense, and therefore, the court would not have found [Owens] eligible for [the program], even if his medical conditions did not preclude his participation.

¶9 On appeal, Owens argues that the circuit court improperly “substituted” a new reason for denying him eligibility to participate in the Substance Abuse Program when he challenged the circuit court’s original sentencing decision. We disagree. Postconviction proceedings afford the circuit court an additional opportunity to clarify the sentencing rationale. *See State v. Fuerst*, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994). The circuit court explained here that the sentencing goals dictated its eligibility decision, regardless of Owens’s health. The record amply supports that explanation.

¶10 At sentencing, the circuit court considered the gravity of the offense, Owens’s character and military service, and the danger that Owens posed to the community. The circuit court then identified deterrence and “abject punishment” for drug trafficking as the sentencing goals. The circuit court explicitly found that Owens’s “addiction and other issues can well be taken care of in a highly structured environment.... [Owens] must be confined as I say most strongly for punishment purposes but also to deter [him] and others.” In postconviction

proceedings, the circuit court further clarified that Owens was ineligible to participate in a program that would shorten his time in prison because, in the circuit court's view, any period of initial confinement that was less than the six-year term selected would be insufficient to serve the sentencing objectives.

¶11 The circuit court's sentencing remarks, coupled with the explanation set forth in its written order denying Owens eligibility for the Substance Abuse Program, fully demonstrate a proper exercise of sentencing discretion. We affirm.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

